IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUNIOR DOE, et al.,	:	
Plaintiffs,	:	
	:	**CIVIL ACTION**
v.	:	**NO. 06-1926**
	:	
ALLENTOWN SCHOOL DISTRICT et al.,	:	
	:	
Defendants.	:	

ORDER

Defendants Allentown School District, Principal Eva Haddon, Assistant Principal Bradley Carter, and Kim Ceccatti have moved for summary judgment on Plaintiffs' Title IX and 42 U.S.C. § 1983 claims. The claims arise from a series of sexual assaults committed by Minor Defendant, a twelve year old fifth-grade ASD student, against five first and second grade ASD students between September 2003 and March 2004. I informed the Parties during a March 13, 2012 conference call that I would grant summary judgment in part and deny it in part. I also informed the Parties that I would issue this Order setting forth the bases of my ruling.

I. Legal Standards

Under Rule 56(a), I must grant summary judgment if the moving Party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

"If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to set forth specific facts showing the existence of such an issue for trial." Shields v. Zuccarini, 254 F.3d 476, 481 (3d Cir. 2001). To

satisfy this burden, the non-moving party must offer a genuine issue of material fact that "exceed[s] the 'mere scintilla' threshold." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

Summary judgment must be entered against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . . In such a situation, there can be 'no genuine issue as to any material fact.'" Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

II. Title IX

A. Legal Standards

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681(a). The Supreme Court has recognized an implied Title IX right of action in cases of peer-on-peer sexual harassment. Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999). To prevail, Plaintiffs must show that (1) the District received federal funds; (2) sexual harassment occurred; (3) the harassment occurred under "circumstances wherein the [District] exercised substantial control over both the harasser and the context in which the . . . harassment occurred; (4) the District had "actual knowledge" of the harassment; (5) the District was "deliberately indifferent" to the harassment; and (6) the harassment was "so severe, pervasive and objectively offensive that it could be said to have deprived the victims of access to the educational opportunities or benefits provided by the school." Davis, 526 U.S. at 629, 643.

The Parties do not dispute that the School District received federal funds and that sexual harassment occurred at Allentown's Central Elementary School. All the attacks occurred in the

School's bathrooms, and all but one occurred during school hours. The Parties vigorously dispute whether the District acted with deliberate indifference to known attacks, and whether the victims suffered resulting deprivation of educational opportunities.

A school has actual knowledge "if an appropriate person at the institution has knowledge of the facts sufficiently indicating substantial danger to the student so that the institution can reasonably be said to be aware of the danger." Bostic v. Smyrna School Dist., 418 F.3d 355, 360 (3d Cir. 2005). Information that merely alerts an appropriate person to the possibility of harassment is insufficient. Id. A school may be held liable only if it is "deliberately indifferent to ***known*** acts of [sexual] misconduct." Davis, 526 U.S. at 643 (emphasis added).

An "appropriate person" is, "at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination." Bostic, 418 F.3d at 360 (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998)). Accordingly, "a damages remedy will not lie under Title IX unless an official, who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond." Gebser, 524 U.S. at 290. Whether a particular school official has authority to institute corrective measures will depend on the facts and circumstances of each case. See Bostic, 418 F.3d at 362 (the record in each case will determine who may be considered an "appropriate person").

To establish deliberate indifference, a plaintiff must show "an official decision by the [school] not to remedy the violations." Gebser, 524 U.S. at 290. School administrators receive substantial deference in cases of alleged student-on-student harassment, and "are deemed 'deliberately indifferent' . . . only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." Davis, 526 U.S. at 648.

Finally, "a plaintiff must establish sexual harassment that is so severe, pervasive and objectively offensive, and that so undermines and detracts from the victim's educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities." Id. at 651. A plaintiff need not show "physical exclusion," but must present evidence of more than "teasing and name-calling." Id. at 651-52. This distinction between unpleasantness and actionable (severe or pervasive) harassment turns largely on the "constellation of surrounding circumstances, expectations, and relationships . . . including, but not limited to, the ages of the harasser and the victim." Id. at 651. The Supreme Court has emphasized that the harassment must have a "systemic effect" of denying equal access to the education program, and thought it unlikely, though not impossible, that "a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect." Id. at 653.

B. Analysis

I will grant summary judgment as to the Title IX claim brought by John Doe I, and deny summary judgment as to the Title IX claims brought by John Does II-V.

John Doe I was a first grade student at Central Elementary at the time of the assault. While he was in a private bathroom stall, an older boy crawled inside the stall, pulled down John Doe I's pants, and touched him in "the crotch." *(Pls' Ex. 41, at 1; Ex. 40, at 3.)* Although Plaintiffs point to an earlier assault against another student to suggest the District knew about assaults taking place in its bathrooms, there is no evidence that School officials had any way to identify the perpetrator of the earlier attack. Officials knew only that another student had been harassed by an older boy, nothing more. *(See Pls' Ex. 67.)* Accordingly, John Doe I has not made a genuine issue of fact as to whether Officials had actual knowledge of ongoing assaults in School bathrooms, or had any idea about who might be carrying out the attacks that did take

place. Without such knowledge, School officials did not act with deliberate indifference by failing to remedy the violations before the attack on John Doe I.

Moreover, John Doe I has not shown that the attack deprived him of any educational opportunities. His psychological/medical expert found that John Doe I, "does not feel that he has any scary feelings or behaviors related to this incident." (*Pls' Ex. 40 at 3.)* Moreover, the expert was "not able to say to any degree to medical certainty that [John Doe I's] problems are or are not related to the alleged assault." (*Id.)* John Doe I has thus failed to show there is any genuine issue of material fact with respect to three of six Title IX elements (actual knowledge, deliberate indifference, deprivation of educational opportunities).

With respect to the other Plaintiffs, however, there is sufficient evidence that Officials—including Assistant Principal Carter and Principal Haddon—knew about the bathroom assaults and were deliberately indifferent to them. For example, Officials asked second grade teacher Ms. LaSanta to look through yearbook photos to identify John Doe I's attacker—whom she witnessed leaving the bathroom immediately after the assault. *(Pls' Ex. 19.)* When she could not identify the attacker's picture, Principal Haddon remarked that special education students likely would not be depicted in the yearbook, but did not ask Ms. LaSanta to look at any other photos or to visit students in the Learning Support program. *(Id.)* M.D. was at that time a special education student. Crediting Plaintiffs' evidence, had Principal Haddon shown Ms. LaSanta photos of those students, she would have identified M.D. Ms. LaSanta also stated in her sworn affidavit that she thought Principal Haddon and Assistant Principal Carter had an idea who the attacker might be. *(Id.)* Nevertheless, School Officials conducted no further investigation. Again, crediting Plaintiffs' evidence, had Defendants investigated further, they would have learned that M.D. was the assailant and prevented the attacks on John Does II-V. The Officials'

"response to the harassment . . . [was] clearly unreasonable in light of the known circumstances." Davis, 526 U.S. at 648.

In addition, Officials were deliberately indifferent following the attack on John Doe III—in which the perpetrator again crawled into the bathroom stall, covered John Doe III's mouth, threatened to harm him, and attempted to touch his genitals. *(Pls' Exs. 43; 23; 22.)* The victim, a first grade student, misidentified his attacker as B.L. After Assistant Principal Carter confirmed that B.L. was not the attacker, he took John Doe III to the cafeteria during lunchtime to see if he could identify anyone. When he was unable to do so, Assistant Principal Carter ended his inquiry. *(Pls' Ex. 12.)* Given the seriousness of the attack, and the previous known bathroom incidents, a reasonable jury could find that School Officials acted with deliberate indifference to known acts of sexual harassment by failing to investigate further or institute bathroom safety measures.

Even after identifying M.D. as the assailant, the School's response was wholly inadequate. Officials placed M.D. on a restricted policy requiring he be escorted to the restroom. The policy did not prevent M.D. from assaulting John Doe IV. Although Officials deserve great deference regarding disciplinary matters, a reasonable jury could find that the School's response was clearly unreasonable in the circumstances known, and amounted to deliberate indifference. Davis, 526 U.S. at 648.

Unlike John Doe I, all other Plaintiffs reported significant deprivation of educational benefits and opportunities. Although experiencing fear and anxiety alone may not satisfy this element, these Plaintiffs produced evidence explicitly linking the attacks to a deprivation of educational benefits and opportunities. Victims reported a complete fear of school bathrooms, leading John Doe III to avoid them to the point of nausea and stomach pains. *(Pls.' Exs. 42, 43.)*

They suffered from anxiety and depression, which affected their abilities to concentrate in school and socialize with other students. *(Pls.' Exs. 44, 45, 69, 47.)* Although Defendants argue that any psychological harm may be attributed to abuse suffered before the attacks, a reasonable jury could find otherwise. Finally, John Doe IV's parents withdrew their child from Central Elementary following his attack, depriving him of the educational opportunities provided by the School. (*Pls.' Exs. 49, 69.)*

Because there are genuine issues of material fact regarding John Does II-V, I will deny summary judgment with respect to the Title IX claims brought by these Plaintiffs.

III. § 1983 Claims

Plaintiffs allege that Defendants Allentown School District, Principal Haddon, Assistant Principal Carter, and Ms. Ceccatti callously disregarded and were deliberately indifferent to Plaintiffs' constitutional rights to bodily integrity. *(Third Am. Compl. ¶75.)*; 42 U.S.C. § 1983. I will grant summary judgment as to these claims.

A. Legal Standards

Plaintiffs rely on a "state-created danger" theory of liability, alleging the School created a dangerous environment that led to the constitutional violations. To prevail, Plaintiffs must make out:

1) the harm ultimately caused was foreseeable and fairly direct;
2) a state actor acted with a degree of culpability that shocks the conscience;
3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the general public; and

4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Bright v. Westmoreland County, 443 F.3d 276, 281 (3d Cir. 2006).

Omissions by themselves or the failure to act are insufficient. "It is important to stress . . . that under the fourth element of a state-created danger claim, liability under the state-created danger theory is predicated upon the states' *affirmative acts* which work to the plaintiffs' detriments in terms of exposure to danger." Id. at 282 (emphasis in original). State actors may not, however, "use their authority to create such an opportunity by failing to act" by, for example, purposefully withholding information from law enforcement. Id. at 283 n.6.

The Third Circuit has recently elaborated the meaning of "shocks the conscience" culpability. In Sanford v. Stiles, the Court concluded that "the state actor's behavior must *always* shock the conscience. But what is required to meet the conscience-shocking level will depend upon the circumstances of each case, particularly the extent to which deliberation is possible." 456 F.3d 298, 310 (3d Cir. 2006). "In a 'hyperpressurized environment,' an intent to cause harm is usually required. On the other hand, in cases where deliberation is possible and officials have the time to make 'unhurried judgments,' deliberate indifference is sufficient." Id. at 310.

B. Analysis

Plaintiffs have failed to produce evidence of affirmative steps taken by School Officials that rendered them more vulnerable to danger than if the School had not acted at all. Rather, Plaintiffs unsuccessfully seek to couch acts of omission—failures to investigate, contact the police, document the attacks, and discipline the attacker—as affirmative acts. Plaintiffs'

arguments are informed largely by their experts' theories that School Officials took insufficient or mistaken actions. Plaintiffs provide no evidence, however, that Officials covered up abuse or encumbered help that might have been afforded them. There simply is no evidence that Officials took affirmative steps that exposed Plaintiffs to greater danger. See D.R. by L.R. v. Middle Bucks Area Vo. Tech. School, 972 F.2d 1364, 1376 (3d Cir. 1992) (no liability for school's failure to investigate and stop known instances of sexual abuse) (en banc); Brown v. School Dist. of Phila., No. 08-2787, 2010 WL 2991741 at *8 (E.D. Pa. July 28, 2010) ("[F]ailure or refusal to discipline, transfer or expel student violators is not a state created danger.").

Plaintiffs also point to the District's decision to transfer M.D. to Central Elementary and not restrict his access to other students. *(Plfs' Mem. at 92.)* These actions may have created a general danger to students, but the attacks on Plaintiffs were neither foreseeable nor a direct result of that action. See Phillips v. County of Allegheny, 515 F.3d 224, 238 (3d Cir. 2008) (Foreseeability requires "an awareness on the part of the state actors that rises to the level of actual knowledge or an awareness of risk that is sufficiently concrete to put the actors on notice of the harm."). Although Officials knew that M.D. had been sexually abused as a child, and had a history of misbehaving—at times in sexually suggestive ways—there is no evidence that he had assaulted anyone before enrolling at Central Elementary or done anything that would have put Officials on notice of the serious risk he posed.

Plaintiffs also allege that the School endangered them by giving false assurances to victims, parents, and teachers, which prevented these individuals from alerting the police. The Third Circuit has held, however, that "assurances of well-being are not affirmative acts within the meaning of the fourth element of a state-created danger claim." Ye v. United States, 484 F.3d 634, 642 (3d Cir. 2007); see Walter v. Pike County, Pa., 544 F.3d 182, 195 (3d Cir. 2008)

("an assurance of well-being despite the presence of a threat is not a sufficiently affirmative act . . . "). Moreover, the school did not affirmatively prevent anyone from calling the police. Rather, Officials stated that they were adequately addressing the situation, which may have influenced others' decisions about whether to contact the police (though Plaintiffs present no evidence to support this allegation). This does not rise to the level of an affirmative step.

John Doe IV makes out the strongest state-created danger claim. Before the attack, Assistant Principal Carter assigned M.D. to "in-school suspension"—apparently a kind of detention. M.D. was thus "detained" with other "suspended" students in a classroom near those of the younger students. When M.D. misbehaved, substitute teacher Jerald Brown, who was supervising in-school suspension, removed M.D. from the classroom and had him sit at a desk near the hallway bathroom, where Brown could still see him. *(Defs.' Ex. 18 at 84.)* A short time later, M.D. entered the bathroom without Brown's knowledge and sexually assaulted John Doe IV. John Doe IV alleges that by detaining M.D. near younger students and failing to inform Brown of the bathroom restriction, Carter and the School made John Doe IV more vulnerable to danger. *(Pls.' Mem. at 88.)* Once again, Carter and the School did not affirmatively act to create the danger which led to John Doe IV's assault or make him more vulnerable to it.

Courts have recognized that it is sometimes difficult to distinguish affirmative acts from failures to act. See D.R., 972 F.2d at 1374. Plaintiff nevertheless does not show how Carter used state authority to endanger John Doe IV. The Third Circuit has held that police failure to warn a murder victim about a perpetrator's known criminal behavior did not constitute an affirmative act, even when the police knew the victim was in danger. Walter, 544 F.3d 182, 194 ("a state actor's failure to warn about the likelihood of a private act of violence—even a highly culpable failure to warn—cannot itself predicate liability."); Phillips, 515 F.3d at 236 ("Our

jurisprudence requires that Phillips allege an affirmative action, rather than inaction or omission."). Plaintiffs fail to show how the District (a state actor) can be held liable for failing to inform Mr. Brown (a state actor) about the likelihood of private violence to John Doe IV (a third party).

Assistant Principal Carter also had no reason to suspect that Mr. Brown would remove M.D. to the hallway so near the bathroom and fail to observe him properly. Moreover, the mere act of placing M.D. in detention near younger students does not shock the conscience in these circumstances. See Morse v. Lower Merion School Dist., 132 F.3d 902, 908-12 (3d Cir. 1997) (school official did not act with requisite culpability or foreseeability when they propped open otherwise locked schoolhouse door, allowing known loiterer to enter and murder teacher).

Finally, the individual Defendants argue that they are entitled to qualified immunity for any §1983 violations. Because I have concluded that Plaintiffs §1983 claims fail as a matter of law, I need not address the reasonableness of Defendants' actions. Walter, 544 F.3d at 196.

IV. Conclusion

AND NOW, this 21st day of March, 2012, it is hereby **ORDERED** that Defendants' Motion for summary judgment *(Doc. No. 245)* is granted in part and denied in part. Summary judgment is granted as to John Doe I's Title IX claim, and on all §1983 claims. Summary judgment is denied as to John Does II-V's Title IX claims.

AND IT IS SO ORDERED.

/s/ Paul S. Diamond
Paul S. Diamond, J.